

## HONOR'S CONSTITUTIONAL MOMENT: THE OATH AND PRESIDENTIAL TRANSITIONS

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### INTRODUCTION

Ever since Bruce Ackerman introduced us to the phrase, constitutional lawyers have come to think of “constitutional moments” as momentous and irregular.<sup>1</sup> They are assumed to be extraordinary occasions on which the nation rethinks its constitutional commitments and, in effect, rewrites them outside the formal constitutional amendment process. In two centuries of constitutional history, Ackerman identifies only three such constitutional moments, including the Founding itself.<sup>2</sup> The rest of the time, constitutional government exists in the realm of ordinary politics.<sup>3</sup>

I want to suggest another approach. Constitutional moments are momentous, but they are not irregular. To the contrary, they are *routine*. In particular, the changeover of executive power that we are undergoing right now bears witness to a simple proposition: *every presidential transition is a constitutional moment*.

American politics routinely treats the peaceful transition of executive power as evidence of the Republic's continuity and stability. But each presidential transition is also a moment in which at least one branch of the federal government must consider anew what the Constitution means and what it demands, and ratify or rescind the constitutional readings that have come before. Every such succession embodies the tension inherent in constitutional moments—the tension between consistency and change.

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<sup>1</sup> See generally 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (setting out his theory of “constitutional moments” in American history).

<sup>2</sup> See, e.g., Steven G. Calabresi, *The President, The Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman*, 73 U. CHI. L. REV. 469, 471 (2006) (noting Ackerman's claim that “the United States has had three and only three constitutional regimes or constitutional moments”). The other two constitutional moments identified by Ackerman are the Civil War and Reconstruction, and the New Deal.

<sup>3</sup> See, e.g., 2 ACKERMAN, *supra* note 1, at 4–8 (distinguishing between “normal politics” and politics in times of crisis).

This Essay argues that the constitutional moment represented by the presidential transition is instantiated in a single act: the taking of the presidential oath. That oath is both an official action and a deeply personal one, and the combination is significant. It suggests the intimate connection between the official duties assigned to the President by Article II of the Constitution and the personal honor of the President. By committing himself to preserve the Constitution and fulfill his Article II duties, the President ties his own honor to a particular understanding of the Constitution.<sup>4</sup> That understanding is infeasible: he cannot simply defer to the understanding of the courts, of Congress, of prior presidents, or even of the people. In taking the Constitution's measure, the President is ultimately on his own.

We have come to think of honor as a largely obsolete virtue.<sup>5</sup> But it has not yet vanished, and its importance crests in the moment of the taking of the presidential oath, as virtually every individual to take the oath has recognized. As Barack Obama prepares to take his own oath as the 44th President of the United States, it is worth considering what that oath means and what implications it has for his presidency.

Part I of this Essay discusses the nature and history of the presidential oath. Part II asks whether the oath's obligations are prospective or retrospective. Part III argues that although other constitutional players' understanding of the Constitution may influence the President, his obligation to interpret the document for himself is infeasible. Part IV offers some advice to President-elect Obama as putative oath-taker.

One note of caution is necessary. Some readers of this Essay have warned against relying too strongly on Ackerman's constitutional moment idea, or have argued that presidential oath-taking does not represent a constitutional moment because Ackermanian constitutional moments are genuinely transformative of constitutional meaning, while a president vows specifically to "preserve" the Constitution.<sup>6</sup> While the contributions of this Essay do not depend on how closely presidential transitions resemble Ackermanian constitutional moments, it is true that are important distinctions between the two.

But it is worth thinking about presidential transitions in those terms because it is important to consider what those transitions say about constitutional *change* as well as stability. Through the oath, presidential transitions require each new president to rethink constitutional meaning for himself. The implications of that obligation can be far-reaching. Such moments may not be as rare as the ones described by Ackerman, but they are all the more remarkable because conscientious oath-takers like the President are required to reimagine the Constitution at such regular intervals. If we can capture a

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<sup>4</sup> I use the masculine throughout this Essay for convenience only.

<sup>5</sup> For a classic discussion, see Peter Berger, *On the Obsolescence of the Concept of Honour*, 11 EUR. J. SOC. 39 (1970), reprinted in LIBERALISM AND ITS CRITICS 149 (Michael J. Sandel ed., 1984).

<sup>6</sup> U.S. CONST., art. II, § 1.

sense of the implications of this obligation and of the weight and solemnity of the oath, we may come to see just how momentous these transitions truly are.

## I. THE OATH AS CONSTITUTIONAL MOMENT

### A. *Reading the Presidential Oath Clause*

The President is not the only officeholder to take a constitutional oath. Under Article VI of the Constitution, *every* federal and state officer takes an oath or affirmation to “support this Constitution.”<sup>7</sup> The language of the federal statute implementing this command requires officeholders to swear or affirm to “support and defend the Constitution of the United States against all enemies, foreign and domestic.”<sup>8</sup>

But only the presidential oath is set out in specific terms in the constitutional text itself. “Before he enters on the Execution of his Office,” the President shall swear or affirm the following: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”<sup>9</sup>

Two aspects of this oath are worth noting. The first is its unique status: the Framers considered it necessary to offer specific language in the Constitution itself for no other constitutional officer. The second is its distinct language. Other officeholders promise to “support and defend the Constitution of the United States”; only the President is sworn to “*preserve, protect and defend*” it.<sup>10</sup>

Whether these subtle distinctions matter has been a subject of some debate. One debate is between those who see the Presidential Oath Clause as containing a general authority to act, extraconstitutionally if necessary, to preserve the nation, and those who believe that the Constitution confers no such authority on the President.

According to the first view, the Constitution should be read as containing a “meta-rule of construction” requiring “national self-preservation”—a rule that “may even, in cases of extraordinary necessity, trump specific constitutional requirements.”<sup>11</sup> The responsibility for judging whether and how

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<sup>7</sup> U.S. CONST., art. VI, cl. 3.

<sup>8</sup> 5 U.S.C. § 3331 (2006).

<sup>9</sup> U.S. CONST., art. II, § 1.

<sup>10</sup> See Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1261 (2004) (“Even more clearly so than with the universal oath requirement [of] Article VI of the Constitution . . . , the Presidential Oath Clause cannot be reduced to a general political loyalty requirement.”).

<sup>11</sup> *Id.* at 1257 (emphasis added); see also Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993) (arguing on different grounds that the President has a “general authority to protect and defend the personnel, property, and instrumentalities of the United States from harm.”).

the meta-rule applies is vested most directly in the President, by virtue of his “special sworn duty” to preserve, protect, and defend the Constitution.<sup>12</sup> Michael Stokes Paulsen roots this meta-rule in the “awesome and personal” duty created by the Presidential Oath Clause to protect, preserve, and defend “the nation whose Constitution it is . . . by every indispensable means within his power.”<sup>13</sup> This view finds its most pithy expression in Justice Jackson’s classic observation that the Constitution is not a “suicide pact.”<sup>14</sup>

Others argue that although “the Constitution creates a powerful chief executive, it does not empower the President to suspend the Constitution in order to save it.”<sup>15</sup> According to this view, Paulsen errs by “too quickly and too easily equat[ing] preserving the Constitution with preserving the nation.”<sup>16</sup> Against Paulsen’s “suicide pact” argument, they argue that “a system that values self-preservation at all costs is a suicide of another sort, for the system sacrifices all other ideals on the false altar of survival.”<sup>17</sup>

A closely related issue is the meaning of the Presidential Oath Clause itself. Does the Clause confer *power* on the President, or does it define and constrain the exercise of power granted to the President elsewhere in the Constitution? Although he denies that the Presidential Oath Clause is a freestanding grant of executive power, Paulsen argues that the Clause incorporates and reinforces “the power to preserve, protect, and defend the nation and its constitutional order that inheres in the traditional understanding of the ‘executive Power’ of a nation.”<sup>18</sup> By contrast, Sai Prakash asserts that the Clause “does not grant power,” but rather “creates a duty” to obey the Constitution.<sup>19</sup>

We need not resolve these debates here. What is important is that a careful reading of the Presidential Oath Clause carries with it significant implications for the President’s role, duties, and powers under the Constitution. Unless he treats the oath as a mere formality, the President cannot shrink from grappling with the meaning of the Presidential Oath Clause.

### B. *Honor and the Oath*

From the first presidential oath-taking to the present day, our chief executives have recognized that the presidential oath is intimately connected to the nature of their duties in office, and thus that it serves as a public

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<sup>12</sup> Paulsen, *supra* note 10, at 1258.

<sup>13</sup> Paulsen, *supra* note 10, at 1261, 1263.

<sup>14</sup> *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

<sup>15</sup> Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 NOTRE DAME L. REV. 1299, 1300 (2004) [hereinafter Prakash, *Constitution as Suicide Pact*].

<sup>16</sup> Thomas P. Crocker, *Overcoming Necessity: Torture and the State of Constitutional Culture*, 61 SMU L. REV. 221, 244 (2008).

<sup>17</sup> Prakash, *Constitution as Suicide Pact*, *supra* note 15, at 1320.

<sup>18</sup> Paulsen, *supra* note 10, at 1263 n.14.

<sup>19</sup> Prakash, *Constitution as Suicide Pact*, *supra* note 15, at 1301.

pledge to stand accountable for the actions they commit in the name of the Constitution.

This connection would have been obvious to the founding generation. In that era, the oath tied the performance of public office closely to “human honor and obligation.”<sup>20</sup> Honor was all the more important in a new nation “lacking an established aristocracy,” in which the display of public virtue and trustworthiness was one of the few “proving ground[s]” available, “a source of stability in [a] contested political [and social] landscape.”<sup>21</sup> Honor was not simply a private virtue; to the contrary, it depended on its public nature. “[A] man of honor was defined by the respect that he received in public.”<sup>22</sup> The Presidential Oath thus tied the President’s personal honor to the conscientious performance of his duties—linking him, in Alexander Hamilton’s words, to “the restraints of public opinion” and “the jealousy and watchfulness of the people.”<sup>23</sup>

The connection between the Presidential Oath and the President’s own conception of his duties, and the threat of dishonor as a mechanism for ensuring the President’s fealty to that oath, has been recognized in presidential inaugural addresses throughout our history.<sup>24</sup> George Washington, for example, in his second inaugural address, emphasized the public nature of his oath, and pledged, if he fell short in his duties, to be “subject to the upbraidings of all who are now witnesses of the present solemn ceremony.”<sup>25</sup> Martin Van Buren noted “the presence of my assembled countrymen” as he prepared “to make the solemn promise that yet remains, and to pledge myself that I will faithfully execute the office I am about to fill.”<sup>26</sup> Benjamin Harrison noted that although there was “no constitutional or legal requirement that the President shall take the oath of office in the presence of the people,” to do so was “manifest[ly] appropriate[,]” because it rendered the oath “a mutual covenant” between the President and the citizenry.<sup>27</sup> In the twentieth century, William Howard Taft noted that any presidential oath-taker who does not “feel a heavy weight of responsibility” either “has no conception of the powers and duties of the office upon which he is about to enter, or he is lacking in a proper sense of the obligation which the oath imposes.”<sup>28</sup>

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<sup>20</sup> Paulsen, *supra* note 10, at 1263 n.13.

<sup>21</sup> JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC* xv (2001).

<sup>22</sup> *Id.* at xvi.

<sup>23</sup> *The Federalist No. 70*, at 477–79 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>24</sup> See Robert F. Blomquist, *The Presidential Oath, the American National Interest and a Call for Presiprudence*, 73 UMKC L. REV. 1, 7–33 (2004).

<sup>25</sup> *Id.* at 9.

<sup>26</sup> *Id.* at 13.

<sup>27</sup> *Id.* at 20–21.

<sup>28</sup> *Id.* at 22.

In short, the Presidential Oath Clause is a deeply—and, in the Ackermanian sense, literally—momentous text. The act of oath-taking ties the President's own honor to his satisfaction of the oath. The act is pregnant with meaning precisely because taking an oath to preserve, protect, and defend the Constitution calls on the oath-taker to consider what that oath means—and, in turn, what the *Constitution* means. Each presidential oath-taker must decide for himself whether the oath calls on the President to preserve the nation at all costs, or whether it calls for the President to hold the Constitution itself above all else. Thus, each president, every four years, becomes the sole participant in a constitutional convention of one.

## II. THE OATH AS PROSPECTIVE OR RETROSPECTIVE

What are the implications of the Presidential Oath Clause? What does it mean for the new President—for *this* new President, and the men and women who will come after him?

One possibility is that the President can treat his oath as beginning with his actions as President—and *only* his actions as President. He must give some measure of repose to any actions by prior oath-takers whose views about the scope of the Constitution might differ from his own. In short, the President could treat his oath-bound obligations as prospective, not retrospective.

This approach acknowledges that each President faces his own constitutional moment and his own interpretation of the Constitution's commands. It recognizes that the new President's obligations under the oath commence only once he has actually taken it. Until then, the duty of the oath attaches only to the current officeholder.<sup>29</sup> Such an approach might ease the inevitable tensions between outgoing and incoming administrations,<sup>30</sup> tensions that would be exacerbated if each new President were viewed as sitting in judgment on the previous administration's actions—a threat that, taken to its extremes, might lead to a flurry of pardons and other preemptive actions by the outgoing administration.

It is not clear, however, that such an approach is realistic, let alone true to the oath. The effects of a president's actions do not cease when he leaves office. Most agency regulations and policies, executive orders, and other administrative actions have continuing force unless and until they are revisited.

Moreover, the President's legal obligations hardly arise solely by virtue of law generated within the Executive Branch. To the contrary, the President's foremost duty is to “take Care that the Laws be faithfully ex-

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<sup>29</sup> Cf. Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1271–73 (2006) (discussing the Term Clauses of Article II); see also *id.* at 1285 (noting that a sitting President “enjoys an electoral mandate for the full four-year period” of his term).

<sup>30</sup> See *id.* at 1263–69 (discussing tensions that arise during presidential transitions).

ecuted,”<sup>31</sup> which includes the continuing obligation to execute the laws enacted by Congress. The Executive Branch may also be subject to ongoing orders of the Judicial Branch. Thus, no new President is completely free to set the constitutional clock to zero upon taking the oath. Indeed, the presidential oath itself suggests as much: the duty to “preserve” the Constitution implies that the President *must* engage in a retrospective examination of at least some prior executive actions.<sup>32</sup>

If so, then the President might in fact be obliged to revisit *everything*. He might view the oath-taking as *requiring* him to examine every continuing legal obligation involving the Executive Branch. In each instance, the new President would have to determine whether those obligations were consistent with his own view of the Constitution, and whether any conflicting views about the constitutionality of those obligations required the Executive Branch to refuse to enforce those legal commands. In extreme cases, the new President would have to decide whether to undertake enforcement actions against those members of prior administrations whose actions, in the view of the new administration, violated the Constitution or laws of the United States.

Putting the matter this starkly suggests two things. First, in practice, opening the books of the prior administration and evaluating every current legal obligation of the new one is unlikely to require wholesale reversal of what has come before. Most laws and actions of prior administrations are simply routine and unexceptional. Still, the fact that *every* law and legal obligation pressing upon the Executive Branch would, on this view, be up for ratification or rejection suggests something of the awesome implications of the Presidential Oath Clause.

Second, this approach presents practical difficulties of its own. Those difficulties are as much constitutional as political. Politically, such an approach would expend significant resources and risk serious political tension, thus threatening to derail an administration's plans for its crucial first months in office. Beyond these political concerns, though, presidential transitions are about stability as well as change. Although the Presidential Oath Clause, properly understood, might obligate the new President to reconsider the constitutional soundness of the legal order, too radical a re-drawing of constitutional lines might damage the symbolic and practical role played by presidential transitions in emphasizing the continuity of our constitutional order.

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<sup>31</sup> U.S. CONST., art. II, § 3.

<sup>32</sup> Cf. Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1632 (2008) [hereinafter Prakash, *Duty to Disregard Unconstitutional Laws*] (arguing that the President's oath “bars [him] from violating the Constitution himself or aiding and abetting the violations of others, for when he takes either measure, he is not preserving, protecting, and defending the Constitution”).

Which choice the new President ought to make—leave the existing landscape undisturbed or treat the oath as obliging him to revisit the whole legal order—is a matter for continuing discussion. It is sufficient for now to note again that however much they may attempt to steer a middle path, incoming presidents must make *some* decision about how to proceed. In that sense, too, each transition is a genuine constitutional moment.

The transition we find ourselves in this time surely heightens our sense of the occasion's momentousness. Justly or not, President Bush has been accused of repeatedly exceeding his constitutional authority in the name of national security.<sup>33</sup> This transition thus places in relief the contrasts we have seen in discussing the Presidential Oath Clause. Correctly read, does the Clause stress the President's inherent authority to preserve the nation at the expense of the Constitution's strict commands, or does it stress fidelity to the Constitution itself? Is the Clause an assignment of power, or a reminder of the President's duties under a Constitution that cabins his authority? Should President Obama leave the current administration's actions alone, or should he reexamine and rescind many of those actions, and even pursue investigations and prosecutions where appropriate?<sup>34</sup> If he is a conscientious oath-taker, President Obama must confront all of these questions, and thus put his own stamp on the Constitution.

### III. THE INDEFEASIBILITY OF THE OATH

In facing these questions, the presidential oath-taker cannot pass the buck. If the President's duty as an oath-taker is personal, then his obligation to consider the scope and meaning of his constitutional authority—whatever the precise contours of that obligation may be—is indefeasible.<sup>35</sup> The President may take advice on these questions—from Congress, from his cabinet officers,<sup>36</sup> and from others inside and outside his administration—but he remains the sole “decider.”<sup>37</sup>

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<sup>33</sup> See, e.g., Michael P. Allen, *George W. Bush and the Nature of Executive Authority*, 72 BROOK. L. REV. 871 (2007).

<sup>34</sup> See, e.g., James Risen & Eric Lichtblau, *Early Test for Obama on Domestic Spying Views*, N.Y. TIMES, Nov. 17, 2008, at A17 (noting that the Obama administration will face a number of early decisions about whether to ratify decisions made by the Bush administration with respect to domestic surveillance, whether to “disclose publicly more information about how the program was run,” and “whether to work with the Democratic-controlled Congress to investigate the Bush administration officials who approved and ran the wiretapping program”) (link).

<sup>35</sup> Cf. Paulsen, *supra* note 10, at 1261 (“[T]he President has an independent, personal, and *nonabdicable* constitutional responsibility of faithful constitutional interpretation and execution.”) (emphasis added).

<sup>36</sup> See U.S. CONST., art. II, § 2, cl. 1 (empowering the President to require opinions from his heads of department).

<sup>37</sup> See Ed Henry & Barbara Starr, *Bush: “I’m the Decider” on Rumsfeld*, CNN.com, Apr. 18, 2006, available at <http://www.cnn.com/2006/POLITICS/04/18/rumsfeld> (recounting President Bush’s description of himself as the “decider”) (link).



To be sure, in deciding what the Constitution means and what obligations the Constitution and his oath impose on him, the President will certainly be influenced by a variety of factors apart from his own views. We might divide these into two categories: informational influences and policy constraints.

Informational influences on the President's views on the Constitution and the oath are likely to come from a variety of sources inside and outside the Executive Branch. First, Congress itself will have spoken on a number of constitutional questions—both informally and in the formal sense that a law's passage by Congress implies that Congress believes the legislation is constitutional. A new president wondering whether he can enforce an existing act of Congress might wish to defer to Congress's judgment that the act is constitutional. But the duty to decide whether that legislation is constitutional ultimately rests with the President.<sup>38</sup>

Similarly, the President *may* consider himself bound to defer to any clearly stated views of the Judicial Branch on questions touching on presidential power. He may do so because he considers those rulings binding in particular cases, or out of deference to the federal courts as epistemic authorities, or because he believes that abiding by the courts' constitutional decisions is itself an implied requirement of the Constitution he has sworn to preserve. How far the President's obligations to the courts run and whether he is ultimately free to ignore them where they conflict with his own constitutional judgments are questions that have roiled constitutional scholarship in the past few years.<sup>39</sup> But the decision to defer is still a decision.<sup>40</sup> Again, then, the presidential oath-taker may listen to others—even coordinate branches—but cannot simply slough off his obligation to decide for himself what the Constitution means.

A more interesting informational influence comes from the actions of previous administrations. In considering what his oath requires, the new president may listen closely to what former administrations have said, either through their actions or through statements by the Office of Legal Counsel and other sources of executive opinion. Let us call this "presidential precedent." A new president might decide to adhere to the decisions of previous administrations just as the Supreme Court adheres to its prior decisions.<sup>41</sup> Like the principle of *stare decisis* in the Supreme Court, however,

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<sup>38</sup> See generally Prakash, *Duty to Disregard Unconstitutional Laws*, *supra* note 32.

<sup>39</sup> See, e.g., Keith Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 254–67 (3d ed. 2000) (discussing the challenges associated with competing constitutional interpretations among the three branches of government).

<sup>40</sup> See Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1077 (2008).

<sup>41</sup> See Prakash, *Duty to Disregard Unconstitutional Laws*, *supra* note 32, at 1634 n.74 ("Whenever presidential administrations confront legal questions previously addressed by their predecessors, there is

presidential precedent cannot be absolute. The President takes an oath to the *Constitution*, not to his predecessors' vision of the Constitution; he may consider their views, but cannot treat them as binding. Indeed, that is precisely the point of the oath: it is *personal*. Each new president must ultimately decide what the Constitution requires of him.

A final source of information is the people. In contemplating his oath and its implications, the President might listen to those who elected him. At transition times, we often ask whether the President has a "mandate" for particular changes, or we treat the election as a referendum on the outgoing President's policies, including those decisions that have constitutional overtones. This language is understandable, but it is also incomplete. The oath may tie the President's fortunes to the people who stand witness to his pledge, but it remains a personal pledge. The question is not whether the new President will gratify the wishes of the people, but whether he will honor the promise that he made to them: to preserve the Constitution *as he understands it*. Thus, the oath's obligation to independently consider the meaning of the Constitution and its obligations is truly indefeasible. Even the people the President serves cannot lift the burden from his shoulders.

Apart from these informational influences on a President's assessment of his oath, a host of practical constraints may influence how a President proceeds. Outgoing and incoming administrations, each of them focused on establishing or maintaining a legacy, may clash over various administrative and policy matters.<sup>42</sup> Significant disagreement on constitutional questions might exacerbate those tensions, especially when the administrations are of two different parties. In rare cases—including, perhaps, the current transition—further tensions may arise if members of the incoming president's party or staff believe the outgoing administration should be investigated for possible wrongdoing.<sup>43</sup> The potential wrangling in such cases may include whether the outgoing administration ought to issue pardons to its own staff, and whether the incoming administration should devote its resources to correcting past wrongs. All of this may convince the incoming administration that it is best to focus on its own agenda rather than incur the costs of correcting past constitutional errors. Moreover, every incoming president must also think strategically about how his own actions will be treated by his successor.

Finally, consider the simple fact of limited resources. As Professor Prakash writes, "[i]f the President had infinite resources, both mental and monetary, satisfaction of his oath might require nothing less than his unremitting attention coupled with perfection."<sup>44</sup> In fact, the new President has

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the question of whether they ought to defer to the statutory and constitutional judgments of their predecessors."'). For an instructive discussion of precedent outside the Judicial Branch, see Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008).

<sup>42</sup> See generally Beermann & Marshall, *supra* note 29.

<sup>43</sup> See Risen & Lichtblau, *supra* note 34.

<sup>44</sup> Prakash, *Duty to Disregard Unconstitutional Laws*, *supra* note 32, at 1675.

a host of policy *and* constitutional obligations, from faithfully executing existing law to pursuing a variety of domestic and foreign policy objectives. These obligations make it difficult for the President to “act as if his only objective was to assure that his administration never executed an unconstitutional statute.”<sup>45</sup>

All this suggests that even a conscientious presidential oath-taker may find it both unwise and difficult—if not impossible—to engage in a wholesale revisiting of the body of law he is charged with executing. Those who have urged President-elect Obama to reverse every constitutional error allegedly made by President Bush may be making unreasonable demands, especially if they also believe that President Obama ought to be working toward an agenda of his own.

As important as these practical constraints are, however, they do not render the President’s obligations under the oath any less indefeasible. How the President balances his own vision of the Constitution with the host of informational influences and practical constraints that hedge him in is up to him. He will build his legacy from the moment he takes the oath, as he considers how to meet his obligations to the Constitution while balancing them with the practical needs of administration and the constitutional views of others.<sup>46</sup>

#### IV. FOUR CONSIDERATIONS FOR THE NEW PRESIDENT

I have argued that the President faces an indefeasible personal obligation under the Presidential Oath Clause to decide what the Constitution means, what powers it confers upon him, and what duties it involves. That obligation may extend as far as literally opening the books on every law he is required to execute, and reexamining and ratifying or rescinding every action taken by the preceding administration. Given the welter of practical constraints on the President that duty is likely to be imperfectly fulfilled, but it is a duty nevertheless.

What does this suggest for the Obama administration itself? As President-elect Obama prepares to take the oath, what should he be thinking about? Let me suggest four considerations, moving from the practical to the abstract.

First, despite the President’s general duty under the oath to preserve the whole Constitution, the President-elect must pick his battles. The costs of treating each presidential transition as a referendum on the entire corpus of executive law are too great to allow the President to focus his “unremitting attention” on these issues.<sup>47</sup> That does not mean the President should

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<sup>45</sup> *Id.* at 1676.

<sup>46</sup> *See id.* at 1677 (“There is a difference between making a decision about how best to allocate scarce resources in a manner that satisfies multiple duties and choosing to turn a blind eye to the potential constitutional infirmities of a law.”).

<sup>47</sup> *Id.* at 1675.

treat his administration as a *tabula rasa*. The oath to preserve the Constitution surely requires the President to take at least some actions with respect to the prior administration—for example, to reconsider executive policies on surveillance, on interrogation policies, and on the constitutional status of Guantanamo Bay.<sup>48</sup> However, the President cannot simultaneously attempt to achieve his policy goals while also treating his administration as a wholesale revisiting of the prior administration. To the extent that the President, in taking the oath, arrives at a different vision of what is constitutional or unconstitutional than the prior administration, he ought to focus on reexamining the most important and continuing cases in which he believes the constitutional oath requires him to chart a different course.

Second, the new President should keep in mind the virtues of transparency. It is no accident, after all, that most presidents have chosen to take the oath in public. As we have seen, they understood that in doing so they were tying their honor to the *public* fulfillment of their oath. A President who sees his oath as demanding a different interpretation of the Constitution ought to make some effort to explain that vision to the people and to the other constitutional actors—the courts, Congress, and state officials—who also take oaths to the Constitution and may interpret the document differently. He should do so not only because honor and the oath demand it, but also because those actors may have something useful to say about his interpretation of the Constitution. Moreover, transparency in these circumstances, by signaling the President's seriousness and sincerity, may enhance his effectiveness in office.<sup>49</sup>

Third, the new President should consider a range of other practical measures he can take to demonstrate that he is a “credible executive.” That includes the use of independent commissions, the making of bipartisan appointments within the Executive Branch, the use of the media, and the use of both informal and statutory “precommitments” binding the President to particular policies.<sup>50</sup> By establishing the President's good faith and credibility, such measures may give him some breathing room as he attempts to fulfill his oath to independently understand and apply the Constitution.

Finally, and more abstractly, the President must *decide*. However much President Bush may have been derided for calling himself the “decider,” under the Presidential Oath Clause that is precisely what he is, at a fundamental level. The President, on taking the oath, must decide for himself exactly what that oath entails: what the Constitution means in his own view, what authority he has, what executive measures he may advance or must

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<sup>48</sup> See, e.g., Kate Zernicke, *McCain and Obama Split on Justices' Ruling*, N.Y. TIMES, June 13, 2008, at A23 (noting that both candidates McCain and Obama during their campaigns advocated closing the detention center at Guantanamo Bay) (link).

<sup>49</sup> See Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 903–05 (2007) (discussing the signaling benefits of transparency in enhancing the credibility of a good-faith executive).

<sup>50</sup> See *id.* at 897–910.

rescind, and what future obligations of legal enforcement or nonenforcement he has. The President may read the Constitution and the oath in the light of history, including the weight of prior presidential practice and the views of other constitutional actors; he may also consider the policy constraints that hem him in. But at the end of the day he must *decide* for himself where his obligations lie.

We may be reassured in all of this by the fact that President-elect Obama is a former constitutional law professor. But two things we know about constitutional law professors should temper that optimism. Too many of them focus, understandably but lamentably, on judicial interpretations of the Constitution rather than on the constitutional text itself;<sup>51</sup> under the oath, the President must crack open the Constitution for himself rather than rely on the Supreme Court's glosses on that document. Second and relatedly, most constitutional law proceeds from the perspective of what the courts have said and done. The "'interpretive stance' of someone swearing the oath of office as President of the United States"<sup>52</sup> is different. It may be influenced by judicial, congressional, and presidential precedent, but it is ultimately singular and independent. Each new President, including this one, will have to relearn and rethink the Constitution, both in the abstract and from a peculiarly presidential perspective.

#### CONCLUSION

The devil is in the details, of course, and this Essay has left many details to be sorted out. Ultimately, the new President must decide for himself what the oath means and what it requires of him; whether he is sworn to preserve the Constitution or the nation itself; whether he must reexamine his predecessors' actions or whether he may treat his oath-taking as Day One; and how he balances his obligations under the oath with the host of informational influences and policy constraints that will confront him. The Presidential Oath, like all constitutional oaths, ties his personal and professional honor to the Constitution, individually and indefeasibly. In making these decisions, the President will be alone, confronted with all the questions of constitutional meaning and obligation that have been with us since Philadelphia. He, and we, will face another in an unbroken line of constitutional moments.

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<sup>51</sup> See, e.g., LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 17 (2008) ("[L]aw school classes in constitutional law typically focus on the unfolding succession of [judicial] rulings—and often spend shockingly little time on the Constitution itself, both as seen through the student's own eyes and as perceived by the non-judicial branches.").

<sup>52</sup> Paulsen, *supra* note 10, at 1261.